IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE, NO. 01-244 Case No. SC01-2670
(Judge Charles W. Cope)
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FLORIDA JUDICIAL QUALIFICATIONS COMMISSION'S RESPONSE TO MOTION TO STRIKE OR ALTERNATIVELY RESPONSE TO UNTIMELY MOTION FOR COSTS

Through its undersigned counsel, the Florida Judicial Qualifications Commission (the "Commission") hereby responds to Judge Cope's Motion to Strike or Alternatively Response to Untimely Motion for Costs as follows:

Introduction

The Investigative Panel of the Commission found probable cause to charge Judge Cope with very serious violations of the Code of Judicial Conduct. After trial, the Hearing Panel found clear and convincing evidence to establish two of those charges. Based largely on Judge Cope's demonstration of remorse at trial, the Hearing Panel only recommended a reprimand. Now, through this motion, Judge Cope comes before this Court claiming that he was the prevailing party and that the Commission should pay his costs and attorney's fees. He attacks the character and integrity of the Investigative Panel, the Commission's attorneys, the alleged victim, and her former boyfriend.[1] He levels several false allegations in his motion. In short, Judge Cope provides no sufficient factual or legal basis to support his demands. All he does is call into serious question the remorse that led the Hearing Panel to be lenient in its

[1] The latter attacks are addressed in a separately filed Motion to Strike the Affidavit of Lindsay Colton.

recommendation.

Costs

1. The Hearing Panel was mistaken in stating the it would consider a motion for costs because the Commission lacks authority to consider a motion to tax costs. This Court has exclusive authority to tax costs. *See In re Hapner*, 737 So. 2d 1075, 1076 (Fla. 1999) ("Under this constitutional scheme, this Court – not the JQC – is vested with the authority to tax costs."). To the extent this Court desires a recommendation on the motions filed before the Hearing Panel, the Hearing Panel filed an order on October 30, 2002, recommending that no costs or attorney's fees be awarded.

2. Judge Cope is not the prevailing party in these proceedings as he was specifically found guilty of violating the Code of Judicial Conduct pursuant to Counts I and III and has accepted the Hearing Panel's recommendation before this Court. Contrary to his statement in his motion, Judge Cope did not admit to this conduct prior to trial.

3. Judge Cope incorrectly states in his motion that "Judge Cope appeared before the Investigative Panel and acknowledged through his counsel his intoxication in California and the inappropriate consensual behavior with the woman in his hotel room." Excerpts of the transcript of the Rule 6(b) hearing are attached hereto as **Exhibit A**.

[2] Judge Cope did not appear before the panel because his attorneys advised him that "[b]ecause there are criminal charges pending, we thought it would be inappropriate for him to comment personally on any of the issues involved n the case." (Tr. at 5.)

4. Through counsel, Judge Cope apologized "for any action on his part that may have caused any embarrassment or disrespect to the judiciary or to the bar," but at no point did his counsel admit any violations of the Code of Judicial Conduct.[3] (*Id.*) A member of the Investigative Panel asked counsel, "In your opinion, were the acts of the judge violations of the canons?" (Tr. at 21.) He specifically asked whether Judge Cope violated Canon 2 regarding avoiding the appearance of impropriety. (*Id.*) Counsel not only declined to admit the violations, but stated that he felt justified in defending Judge Cope on such charges. (*Id.*) Indeed, counsel downplayed Judge Cope's public intoxication considerably, at least with regard to the first night. (*See* Tr. at 41 ("Judge Cope, if he was intoxicated the first night, it was not discernible to any extent.").)

5. With regard to the inappropriate conduct charge, Judge Cope did not admit to any inappropriate conduct on the beach, although his counsel did describe his conduct in his hotel room as "behavior of which he is certainly not proud." (Tr. at 17.) The basis for the Hearing Panel's finding of a violation of the Code of Judicial Conduct and its recommendation for discipline was that the inappropriate conduct

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[2] Rule 6(b) hearings are confidential as a matter of law, but Judge Cope has waived this confidentiality to the extent of his assertion quoted above. Only excerpts directly relevant to this assertion are attached.

[3] The lone possible exception is that his counsel suggested that Judge Cope probably did have an obligation to report his arrest to the Commission. (Tr. at 29.)

occurred on the beach, a public place. (Findings, Conclusion, and Recommendations at 6, 11.) In short, it is simply not true, as Judge Cope claims in his motion, that "before any formal charges were filed Judge Cope readily acknowledged the conduct which the Hearing Panel appropriately concluded had occurred."

6. Nor did he admit his misconduct once the formal charges were filed. To the contrary, Judge Cope denied the charges and underlying allegations in his Answer and Affirmative Defenses and asserted that the allegations of his public intoxication and inappropriate conduct "fail to state a cause of action" and that the JQC lacked jurisdiction over the charge of inappropriate conduct. The Florida Rules of Civil Procedure provide in part, "When a pleader intends in good faith to deny only a part of an averment, the pleader shall specify so much of it as is true and shall deny the remainder." Fla. R. Civ. P. 1.110(c). Among the averments that he denied in his answer were:

a. In the early morning hours of April 4, 2001, while in Carmel-by-the-Sea, California for a judicial conference, you became intoxicated and wandered the public streets. (Amended Notice of Formal Proceedings ¶ 1.)

b. When the women discovered that the door to their hotel room was locked and they could not find their key, you suggested they come to your hotel room at the La Playa Hotel a few blocks away. (*Id.* at ¶ 4.)

c. You and the two women began walking down the middle of the public street in an obviously intoxicated state and were picked up by a police officer, who drove the three of you to your hotel. (*Id.* at ¶ 5.)

d. After the police officer returned the two women to their hotel room

during the early morning hours of April 4, 2001, you returned to the women's room and asked the daughter to walk with you on the beach. (*Id.* at ¶ 12.)

e. Regardless of whether the daughter initiated the intimate conduct or actively resisted sexual advances by you, your conduct tends to undermine the public's confidence in the judiciary and demeans the judicial office. (*Id.* at 14.)

f. During the evening of April 4 and early morning hours of April 5, 2001, you again became very intoxicated in public and wandered the streets. (*Id.* at ¶ 6.)

7. Judge Cope further denied the allegations in his Answers to First Set of Interrogatories (a copy of which is attached as **Exhibit B**) and in his Response to Request for Admissions (a copy of which is attached as **Exhibit C**). As late as June 11, 2002, less than two weeks before the trial, Judge Cope swore under oath again that these discovery responses, which denied the allegations quoted above, were true in his Answers to Third Set of Interrogatories (a copy of which is attached as **Exhibit D**).

8. Even during settlement negotiations when Judge Cope offered to plead to public intoxication, he firmly insisted that he did nothing wrong under Count III (inappropriate conduct). Attached as **Exhibit E** is a page from a letter from Mr. Merkle from settlement negotiations in which he expressly stated that this was Judge Cope's position.

9. For these reasons, Judge Cope should not be considered the prevailing party. The predominant, if not only, issue in proceedings before the Commission is whether the judge violated the Code of Judicial Conduct. Judge Cope denied that he

did, the Investigative Panel was forced to file formal charges, and the Special Counsel succeeded in proving two violations. The Hearing Panel recommended that Judge Cope be disciplined for these violations, although it only recommended a reprimand because Judge Cope had shown remorse at trial. Judge Cope's subsequent protestations that he somehow prevailed against the Commission does nothing but call the issue of his remorse into serious question.

10. Moreover, even if there were a basis to award costs, the costs Judge Cope demands are grossly in excess of those awardable under Rule 2.140, Florida Rules of Judicial Administration, which limits recoverable costs to "(1) court reporters' fees, including per diem fees, deposition costs, and costs associated with the preparation of the transcript and record; and (2) witness expenses, including travel and out-of-pocket expenses."

11. Judge Cope demands such unrecoverable and unreasonable costs as:

a. travel time for his attorneys and their families (including in-town travel to attend meetings with Judge Cope and to attend the trial and charges for cancelled plane tickets);

[4]

b. "travel expenses to Barnes & Noble bookstore to locate a book on cross-examination";

c. a polygraph examination;

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[4] Aside from *In re Hapner*, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions (the "Uniform Guidelines") are the closest authority on point for determining taxable costs. The Uniform Guidelines do not allow taxation of any travel expenses by the prevailing attorney and expressly prohibit taxing of travel expenses "incurred in connection with the taking of depositions out of the City or State." *Id.* at ¶ 3.

d. attorney's fees for "J. Gregory Merkle – Associate Counsel for purposes of Maryland depositions";

e. costs related to depositions of witnesses not called to testified and costs related to transcripts not actually used at trial;[5]

f. long distance telephone charges, conference call charges, facsimile charges, and photocopy charges;[6]

g. unspecified investigative services;

h. "weather information";

i. nearly $2,400 for "document enlargements" (presumably for the single enlarged map used at trial);

j. witness charges and fees for experts who did not testify,[7] including no less than three separate "expert witness fees" for Arthur England (shown on affidavit of costs for May 31, 2002 ($5000.00), June 26, 2002 ($1389.02) and July 31, 2001 ($1418.14) (more than thirty days after the trial);

k. "professional services" for Sidney J. Merin, Ph.D.; and

l. the deposition transcript of a witness who was not deposed (at least not with notice) (i.e., University of California Records Custodian).

12. None of these expenses are awardable either under Rule 2.140 or the

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[5] The Uniform Guidelines provide that depositions costs are recoverable to the extent the deposition was read into evidence at trial. *Id.* at ¶ 1(A), (B). These guidelines specifically provide that costs of depositions not used at trial are not recoverable absent unusual circumstances. *Id.* at ¶ 1(E).

[6] The Uniform Guidelines expressly provide that long distance costs are not taxable. *Id.* at ¶ 6. They only allow photocopies to be taxed for copies actually filed in Court or received in evidence at trial. *Id.* at ¶ 7. Copies obtained during discovery and not used at trial generally should not be taxed. *Id.*

[7] The Uniform Guidelines regarding taxing of expert costs all contemplate that any taxable costs relate to an expert whose live testimony or deposition testimony was offered at trial. *Id.* at ¶ 2.

Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. This Court has expressly held that travel costs are not recoverable costs. *In re Hapner*, 737 So. 2d at 1077.

13. Judge Cope also provides no documentation to support any of the costs. There is no invoice showing that Judge Cope has been charged these costs or has paid them. There are no receipts. There is no description of how any of the listed items relates to the case or why such costs should be considered taxable. Before any costs can be taxed, the Special Counsel demands an evidentiary hearing, and before that hearing, the Special Counsel must be afforded the right to inspect all underlying documents and conduct any other necessary discovery.

14. This Court has warned that "the costs assessed in a JQC proceeding be kept within strict bounds" because the amount of costs to be taxed to the prevailing party "must not be so substantial that costs will deter either the JQC from initiating a prosecution or a judge from defending against a charge." *In re Hapner*, 737 So. 2d at 1076.

Attorney's Fees

15. Judge Cope also demands that the Commission pay the attorney's fees he incurred in unsuccessfully defending the charges against him. He claims that the prosecution was frivolous and thus justifies an award of fees under section 57.105, Florida Statutes.

16. This Court has held that attorney's fees may not be awarded to the prevailing party in JQC proceedings. *Id.* at 1077. Section 57.105, Florida Statutes

only applies to civil proceedings and actions, not actions in front of the Florida Judicial Qualifications Commission. *Cf. Procacci Commercial Realty, Inc. v. Dep't of Health and Rehab. Servs.*, 690 So. 2d 603, 608 n.8 (Fla. 1st DCA 1997) (§ 57.105 only applies to civil proceedings, not administrative proceedings); *State v. LoChiatto*, 381 So. 2d 245, 247 (Fla. 4th DCA 1979) (§ 57.105 only applies to civil proceedings, not criminal proceedings).

17. Most importantly of all, however, the alleged factual basis for § 57.105 sanctions is absolutely false. *See* Affidavits of John S. Mills and Thomas C. MacDonald attached hereto as **Exhibits F** and **G**.

18. In addition to these false allegations by Judge Cope, he represents to this Court that he "was ultimately acquitted on all such criminal charges" in California. In fact, he pleaded no contest to public drunkenness in exchange for the State of California dismissing other charges. Under California law, a plea of no contest equates to a criminal conviction. Moreover, he was not acquitted of the remaining charges. To the contrary, the district attorney dismissed these charges to prevent Judge Cope and his counsel from further harassing the alleged victims, as they had during the depositions and hearing in these proceedings. These facts are established in the Declaration of Lisa Poll, attached hereto as **Exhibit H**.

19. In short, Judge Cope's assertions that he has been prosecuted on frivolous charges is itself a frivolous claim. The Commission should not be required to pay his attorney's fees.

20. Finally, the $316,465.00 in fees demanded by Judge Cope are unreasonable. Even if there were a legitimate basis for an award of fees, Judge Cope's

demand is wholly unsupported by evidence required to determine whether they are reasonable. No time descriptions are provided, no expert testimony is provided, no qualifications of the various time keepers is offered, etc. Discovery and evidentiary hearing would be required before any determination of amount.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Robert W. Merkle, Jr., Esq.**, Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson,** Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; and **Brooke S. Kennerly,** Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303, this __ day of November, 2002.

By: _____

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